Supreme Court, U.S.
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In The

Supreme Court of the United States

In re KEVIN SHAWN BLYDEN,

Petitioner.

On Petition For Extraordinary Review And Writ Of Mandamus And/Or Prohibition To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR EXTRAORDINARY REVIEW AND WRIT OF MANDAMUS AND/OR PROHIBITION INTERLOCUTORY REVIEW

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38 pp

QUESTION PRESENTED

Where the United States Court of Appeals, for the Eleventh Circuit, and a Circuit Judge thereof, remands a Case to the jurisdiction of the United States District Court with instructions to conduct an Evidentiary Hearing into specific issues; and where the Chief Judge of the United States District Court conducts the Hearing, compiles and files his "Findings of Facts and Conclusions on Remand", and returns the Case to the jurisdiction of the Appellate Court; May the appellate Court and a Judge thereof, absent any suggestion(s) that it is clearly erroneous, set aside or simply ignore the Findings of facts and Conclusions of the Chief Judge of the District Court? And is such action not an abuse of supervisory judicial discretion?

PARTIES TO THE PROCEEDINGS

The Petitioner in this Case is Kevin Shawn Blyden, the Defendant-Appellant in the case: The United States of America vs. Kevin Shawn Blyden, Case No. 01-142959, currently pending in the United States Court of Appeals, for the Eleventh Circuit.

The Respondents in this case are the United States Court of Appeals for the Eleventh Circuit; and Honorable Gerald Bard Tjõflat, Circuit Judge thereof. The respondents are possessed of the jurisdiction pursuant to 28 USC § 1291, to hear appeals from all final decisions of district courts of the United States.

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PETITION FOR EXTRAORDINARY REVIEW, AND FOR WRIT OF MANDAMUS OR PROHIBITION

Kevin Shawn Blyden ("Blyden"), the Petitioner, hereby petitions for extraordinary review, and for a writ of mandamus or prohibition to the United States Court of Appeals, for the Eleventh Circuit, and to Honorable Gerald Bard Tjoflat, a judge thereof, reversing the decision of that Court and its Judge, ignoring and setting aside the "Findings of Facts and Conclusion on Remand", filed in that Court by the Chief Judge of the United States District Court, who conducted the Appellate Court ordered evidentiary hearing; and to require the Appellate Court to show due deference to the Findings of Facts and Conclusion of the Chief Judge of the United States District Court, and thereby allow Blyden to retain new Counsel on Appeal, since to do otherwise, would effectively be condemning Blyden's appellate efforts to less than a perfunctory, meaningless exercise undertaken by an attorney who was found to be given to actions more associated with shysterism, and charlatanism, as opposed to effective, honest and zealous lawyering required.

OPINIONS BELOW

THE OPINION OF THE COURT OF APPEALS

The Opinion of the Circuit Judge upon receipt of the Findings of Facts and Conclusion from the District Court, is in the form of an Order denying the expressed desire of Tony Axam, Attorney at Law, to withdraw as Counsel on Appeal for Blyden, and orders him to represent Blyden, and to file his Brief by October 10, 2002. **See Circuit Order, August 1, 2002**. This Order came in the wake of the Findings of the District Court.

The Opinion of the Chief Judge of the United States District Court who conducted the Circuit ordered Evidentiary Hearing, embodied in the Findings of Facts and Conclusion, is that Blyden should be allowed new counsel if there is to be an appeal.

JURISDICTION

The Jurisdiction statement and petition for extraordinary review and issuance of a Writ of Mandamus or Prohibition reviews the relevant dates. The Appellate Jurisdiction of the Court is invoked in Case 01-142959 pursuant to 28 USC § 1254; the Jurisdiction of this Court is invoked pursuant to 28 USC § 1651(a), to review the August 1, 2002 order of the 11th Circuit judge.

RELEVANT RULES AND STATUTES INVOLVED

Federal Rules of Civil Procedure Rule 52(a), 28 USC § 1291, 28 USC § 1292(b), 28 USC § 1651(a), and 28 USC § 1254.

STATEMENT OF THE CASE

1. Overview A federal Appellate Court must show great deference to factual findings of a district court, and may only overturn or ignore or set aside such findings, if they are clearly erroneous, as governed by provisions of Fed. R. Civ. P. 52(a) which states in part:

> **"Findings of fact, whether based on oral or documentary evidence, *shall not be set aside* unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses".**

The issue in the instant case is whether the United States Court of Appeals for the Eleventh Circuit and a Circuit Judge thereof, having remanded a Case in an Order titled, "Limited Remand", for an Evidentiary Hearing, into issues involving what amounts to a dispute between client/ appellant and his counsel, then, after the Chief Judge of the United States District Court complies fully, with the instructions of the Appellate Court on remand, by conducting the Evidentiary Hearing, then compiles the results in a document titled "Findings of Facts and Conclusion on Remand," then files it under 'seal', and then returns the Case to the jurisdiction of the Appellate Court along with a copy of the "Findings . . . ," can simply set it aside, without the making of, or meeting, the 'clearly erroneous' standard of Fed. R. Civ. P. 52(a); and which the Supreme Court of the United States has previously defined.

2. Proceedings in the Court Below Blyden was involved in a drug importation and conspiracy, was arrested in March 1999, and he later pled guilty in September 2000. He was later sentenced in July 2001 to a term of 144 months.

Blyden, at time of arrest, and while in custody at a County Jail, and with the assistance of his family, retained the services of Tony Axam, Attorney at Law, at great expense ($150,000.00), to provide 'case' representation. Much was offered. Little was provided. There was no trial. There were no promised investigations.

Blyden filed Notice of Appeal. His Counsel filed motion with the Appellate Court to withdraw. Blyden, in response to counsel's motion, offered no objections, but requested that the Court impose a requirement for the Counsel to promptly turn over his records, along with a 'Statement of Account' for fees paid, as a condition of withdrawal.

The Appellate Court thereafter, issued an Order titled "Limited Remand" in which the court instructed the United States District Court, to conduct an evidentiary hearing into the following issues:

a) Determine whether Defendant Blyden is indigent and financially unable to retain counsel for his appeal;

b) Inquire of Blyden and his counsel as to his present financial circumstances;

c) Inquire into the amount paid to retained counsel for fees and expenses and the amount, if any, still owing to counsel; and

d) Determine whether the fees received by counsel were in excess of what would constitute a reasonable fee under the circumstances of counsel's representation of Blyden in the District Court.

The Appellate Court remanded the case to the District Court in February 2002. The Chief Judge of the United States District Court, conducted the ordered evidentiary hearing on April 16, 2002. As part of the hearing, the District Judge ("the Judge"), among other techniques, called witnesses, including Blyden, Tony Axam, Counsel; and one Jack Boone, attorney at law not retained by Blyden, but who was apparently brought into the case by

Axam. He also interviewed the Probation Officer; reviewed the record, and ordered submittals (affidavits, etc.), and subsequently reviewed said submittals.

The Chief Judge of the District, a mature, well respected and experienced jurist, in the course of conducting the Hearing, made observations and discoveries that in his opinion were relevant and material to the overall issue, and as he noted **(see Findings at page 8)**, "I would feel remiss in not reporting some observations about the relationship between Defendant Blyden and Mr. Axam", as the Chief Judge puts it. The Judge exercised his broad discretion in the conduct of the evidentiary hearing. As he puts it at page 8 of the Findings, "while the remand of the Eleventh Circuit Court of Appeals is not specific in directing such questions to this Court . . . ", he would be remiss. . . . The Chief Judge's actions in this regard, possess extraordinarily strong ethics – in the beginning he was a lawyer and he did take an oath as both an attorney and an officer of the court; judicial – he is a Judge – The Chief Judge of the United States District Court; moral – he sees and recognizes 'wrong,' and exercises his moral obligation to point it out; and biblical – in the sense of the biblical admonition to all, "if the watchman sees the peoples' danger, and does not warn them . . . then the fault or blame lies on him". The Hearing is concluded and findings entered June 6, 2002 under Seal. The completed result of the Evidentiary Hearing, titled "Findings of Facts and Conclusion on Remand" was, on the order of the Chief Judge, forwarded with the transcripts to the Court of Appeals, Eleventh Circuit under seal in June 2002, and thereby transferred the case back to the jurisdiction of the Appellate Court. The District Court did not 'serve' Blyden with a copy of the "Findings . . . ".

3. Proceedings in the Appellate Court Below

Sometime after receipt of the "Findings . . . ", (recall that Blyden was to this point still not served with a copy) the Appellate Court issued an Order, unbeknownst to Blyden, directed to Mr. Axam, in which it denied his Motion to Withdraw, and ordered him to represent Blyden on Appeal and to prepare and file the Brief of Appellant. Meantime, Blyden, the order issued still unknown to him, and the filing of the Finding with the Court under seal also still unknown to him, made inquiries of the District Court initially without any response. Having requested a Docket Sheet from the District Court, receiving and reviewing it, he became aware that the Findings of the Chief Judge was rendered and filed under seal and sent to the Appellate Court. In August 2002, Blyden began his efforts to unseal and secure a copy of the Findings. Finally, the District Court belatedly granted his motion to unseal and directed him to the Appellate Court to request a copy, which Blyden promptly did. Finally on December 13, 2002, the Appellate Court provided Blyden with a 'partial' copy of the Findings of Fact and Conclusion on Remand ordered unsealed by the Court that placed it under seal to begin with; and after Blyden moved to have the Appellate Court to reconsider its decision to ignore or set aside the Findings, and order Axam to file Blyden's Brief of Appellant; and after Blyden had moved to seek review of the matter by a Justice of the United States Supreme Court.

In ordering Mr. Axam to represent Blyden on appeal, clearly contrary to the Findings of Facts and Conclusion of the Chief Judge of the District Court, the Appellate Court in effect repudiates the provisions of Rule 52(a). But, let's take a look at some of the findings and conclusions being ignored:

e) Amount of the fee paid by Blyden to Mr. Axam was excessive

f) Amount of the fee paid by Blyden to Mr. Axam is unreasonable.

g) Amount of fee paid by Blyden to Mr. Axam was more than $50,000.00 in excess of what may be considered reasonable.

h) That Mr. Axam kept no contemporaneously made time and expenditure record.

i) Mr. Axam's testimony at the hearing was in conflict with the testimony of Mr. Boone, and with Mr. Axam's own 'letter affidavit'.

j) That the relationship between Blyden and Mr. Axam had deteriorated to the point that it is entirely 'antipathetic'.

k) That Mr. Axam expressed considerable level of remorse about his handling of Blyden's case, especially the sentencing phase.

l) That Blyden is understandably, vociferously, and decidedly displeased about the entirety of Mr. Axam's representation, the amount of money he accepted from his (Blyden's) family, and few meetings. And the list of findings and conclusion goes on.

From all of this, the Chief District Court Judge concluded that:

> **"it would be impossible for any level of confidence to be resurrected between Blyden and Mr. Axam. . . ."**

Most importantly, it is the conclusion of the Chief Judge of the District that, as he puts it at page 8 of his Findings . . .

" . . . it is my view that alternate counsel should be appointed for the Appeal, if there is to be one. . . . "

4. The Findings and the Appellate Judge's Pontius Pilate approach

The Judge of the Appellate Court, upon receipt of the Findings of the Chief Judge of the District Court, ordered Mr. Axam to represent Blyden on Appeal, that he should file the Brief of Appellant. This Order, in addition to not being served upon Blyden, effectively ignored and set aside the Conclusions of the Chief Judge of the District. To be sure, the Chief District Judge rendered a thorough Findings of Facts and Conclusion. In the face of Findings the Circuit Judge Tjoflat took what is best described as a 'Pontius Pilate' approach. His response under the circumstances of the Findings and Conclusions is effectively one of inaction that is 'Pontius Pilate' in nature; effectively washing his and the Appellate Court's proverbial hands rather easily of what might best be termed a 'sticky' situation-involving an attorney, his client (Blyden) and his asserted right to a meaningful, more than perfunctory Appellate Review of aspects of his case. The Appellate Judge's approach ignores the most telling – and sad – feature of the Chief District Judge's Findings of Facts and Conclusion, to wit:

" . . . it is my view that alternate counsel should be appointed for the Appeal, *if there is to be one.* . . . "

See the Findings page 8.

The Chief District Judge noted that while the remand is not specific in directing such questions to his court, he

would be remiss in not reporting his observations; and he goes on to state a few, including:

> **" . . . it would be impossible for any level of confidence to be resurrected between Blyden and Mr. Axam. . . . "**

To be sure, the Chief District Judge had access to vastly more informational resources, allowing for his effective deployment and employment of his mature and experienced observational abilities and powers. This, then, should preclude the application of Appellate Judge Tjoflat's 'Pontius Pilate approach'.

As the pages of the popular business publications over the last twelve month period have reminded all, there are consequences of monumental proportions for a democratic people, its capital markets, and their very existence, when the misdeeds of professionals in position of trust are ignored by those who are in a position to see, and do see, but yet, do nothing. The results, in the aftermath of the Enrons, and the Worldcoms, etc., etc., include creation and imposition of more laws, such as Sarbanes-Oxley, which now requires of all professions, attorneys and their law firms, to effectively become what is popularly called 'Whistleblowing'. They must now 'tell' when they witness misdeeds or misconduct. Needless to say, as a group, the profession does not like that. But it is arguably the signs of the times when a rather popular, well known, business publication, at the end of the most recent twelve months, declared three people – whistleblowers – "Persons of the Year". They are the ones – the few, who dared called attention to their 'findings' or observation of misdeeds: It is to be noted, that of the three who dared, one called attention to a 'governmental agency's' misdeeds. Lest the impression is left that it is limited to the private sector.

In the instant case, a Chief District Court Judge, possessed of the powers accorded a finder of facts, uniquely suited and positioned to observe and make inquires, observed and reported his observations and made conclusions therefrom and returned the remanded case from whence it came only to have his efforts embodied in his Findings of Facts and Conclusion on Remand ignored and set aside by the Circuit Judge of the Appellate Court. To be sure, there is nothing flattering about the misdeeds and the confessions of misdeeds by Mr. Tony Axam, Attorney at Law, duly licensed to the State of Georgia, especially in the eyes of those who were formerly active practicing lawyers; and who now, having ascended and sit in position to receive submittals from one who is the subject of such confessed unflattering misdeeds – as an 'officer of the Court' no less. The actions of the Chief District Court Judge, under the circumstances, demands the due deference to which it is entitled, especially under the circumstances.

Consider an analogy: an employee confesses to stealing from his employer during his brief period of employment. A position for security guard comes open, he is considered for said position, and then, in the face of his admitted pilfering, he is assigned the job of security guard with the keys and access to his employer's valuables. What can be expected of such? It is the same scenario here. Counsel was dishonest. He was found to be dishonest. Counsel was given to misleading and outright false statements. He was found to have given misleading and outright false statements – under oath and in his affidavit. He mishandled his legal duties for which he was hired. He admitted and was remorseful about his mishandling of the legal duties for which he was retained and handsomely paid. In the wake of all this and more misdeeds, he is essentially accorded a vote of confidence by the Circuit

Judge who ordered him to represent the same individual – his former client, that he admitted to and was found by the Chief District Judge to have victimized.

The Chief District Judge's Findings of Facts and Conclusion on Remand, encompasses his assessment of the credibility of Mr. Axam, Attorney at Law, whom, by his actions, statements, and affidavits, the statements of others, including a fellow member of the Bar, the Chief Judge found not to be credible. In fact, reading of the Chief Judge's Findings in its entirety, one can't but be left with the impression that among other things, Mr. Axam appears devoided of any vestige of credibility.

5. But the Order on Remand didn't specifically ask for such findings

The argument that the Court of Appeals did not specifically ask for such additional Findings of Facts and Conclusion, flies in the face of a District Court's Chief Judge's **moral, ethical, judicial and biblical** obligations. From a biblical point of view, "If the watchman sees the people's danger, and does not warn them, then the fault rest with him." **see the Scripture at Ezekiel 33:2-7.** According to the writings of this 6th century B.C. Hebrew priest, this standard has been recognized since at least the 6th Century. It is no less applicable in this day and age.

The Chief District Judge's discoveries offered no sanctuary from his obligations in the face of observed and confessed misdeeds of an 'officer of the Court,' Mr. Axam, and his Findings shall not be lightly set aside. For the Chief District Judge not to have recorded and forwarded his observations, and discoveries in his Findings to the

Appellate Court, in other words, to have just simply observed and discovered it, and to ignore it and say nothing, i.e. not bringing it to the attention of the Appellate Court, would be to display 'great indifference', a la the famous Alice Crimmins' case in Queens, N.Y. in the very early 1970's, where a passerby on one side of the street, observed Ms. Crimmins being beaten up, but did nothing, he simply went on by. Ms. Crimmins was later found dead. Hearing about her death and recognizing the location and the incident in the news, he came forward and acknowledged he saw the incident. Asked why he did nothing, he replied, that it was not his business – none of his concern. While, this is extreme compared to the current case, the principle is fundamentally the same. The Chief Judge of the District could have simply ignored his obligations, but to his credit he did not. Instead, he recorded and forwarded it, **NOT** to be ignored.

6. The Denial

The Circuit Judge of the United States Court of Appeals, Eleventh Circuit, without explanation, took the 'Pontius Pilate' approach. He washed his hands of the unflattering Findings and Conclusions of the Chief District Court Judge as to the dishonest, unprofessional conduct and remorse filled confession to the misdeeds of member of the Bar Tony Axam – and without explanation or a finding. This amounts to an effective denial, and in ordering Mr. Axam to represent Blyden on Appeal in the face of the Findings, the Circuit Judge Gerald Bard Tjoflat, effectively condemns Blyden to a situation reminiscent of the scene in Dante's Inferno in which, 'two men who loathe each other are strapped together, back to back, wallowing in filth for eternity.' The Order of the Eleventh

Circuit, under the circumstances, guarantees that Blyden will not have the more than perfunctory appeal he seeks. Did the Eleventh Circuit have alternatives? Yes. **a)** It could have done as it has; **b)** Order a new Counsel to take over appellate representation (at Axam's expense), as recommended; or **c)** Allow Blyden to undertake representation of himself on Appeal. The Appellate Court took an option which manifestly ignores the Findings of the Chief District Court Judge, and did so in constructive silence -- without explanation.

7. REASONS FOR GRANTING THE WRIT

As noted at the very outset of this petition, **Fed. R. Civ. P. 52(a)** governs review of a District Court's Findings of Facts. It states:

> **"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of witnesses."**

The Supreme Court defined "clearly erroneous" when it stated, "A finding is clearly erroneous when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *See United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948). This law of the land is well established – for more than fifty years. Now, while it is typically the appellant who has the burden to show that the lower Court's Findings are clearly erroneous, *see e.g. Lewis v. Timco,* 736 F.2d 163, 166 (5th Cir. 1984), in the instant case, it is the United States Court of

Appeals, Eleventh Circuit, and Honorable Gerald Bard Tjoflat, to whom the burden falls to show that the Findings of the Chief District Court Judge is 'clearly erroneous'.

The Court has also cautioned that an Appellate Court should not duplicate the role of the lower court. "That is, if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). In the instant case, in ignoring the Findings resulting from the evidentiary hearing it ordered, the Circuit Judge in effect places himself in the seat of the Chief Judge of the District – the trier of fact.

To be sure, this Court's warning does not mean that an appellate court will not or cannot reverse the District Court's Findings . . . Not at all. It just means that the appellate court must show substantial deference and must determine if the Findings of the District Court conflict with the weight of the evidence. Here, the appellate court makes its determination based upon an examination of the entire record. It is also here noted that a District Court's *credibility* findings between conflicting testimonies can virtually never be clear error. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

Finally, it is well settled, that "if a Findings of a District Court is to be set aside, it must be because it is clearly erroneous, not because it is derived from a particular source," *see U.S. v. Cornish*, 348 F.2d 173 (1965). This is even when a district court requests and receives and

adopts a counsel's proposed findings. This suggests that in the instant case, the reason or argument that the remand order didn't specifically ask for such observations, findings and conclusion, would simply be an attempt to deny the well settled and accepted discretionary powers of the District Courts, and is without merit. But, there is another segment to this, the concept of judicial stability and economy.

8. Judicial Stability, Economy and Public Interest

The public's interest in the stability and judicial economy is promoted by recognitior that the trial court is indeed the 'Finder of Facts', **NOT** the Appellate Court. To do otherwise would be to undermine the legitimacy of the district courts in the eyes of, among others, litigants, and multiply appeals by encouraging appellate retrials of some factual issues and needless reallocation of judicial authority and resources.

The standard of review of a district court's findings, is a matter of legislative prerogative, in that the intent of **Rule 52(a)** is to authorize close scrutiny of district court's findings for errors of law – not facts.

9. Irreparable Injury

To allow former counsel Axam to undertake what would amount to no more than a perfunctory exercise (a repeat performance of his remorse filled confession during the evidentiary hearing), to Blyden's efforts at obtaining a meaningful **direct** appellate review, would be fatally prejudicial to Blyden and cause irreparable harm to be visited upon him. This is his direct appeal of the final

judgment and sentence of the United States District Court. He gets only one so termed 'bite of this direct proverbial apple'. An Order of the Circuit Judge requiring Mr. Axam to represent Blyden on Appeal against his expressed (see Axam's Motion to withdraw), and the expressed wishes of Blyden himself (see Blyden's response to Axam's motion to withdraw); and in the wake of Mr. Axam's confessions at the evidentiary hearings as to his mishandling (he was remorseful) of Blyden's case – especially the sentencing phase – at the trial level; coupled with his instances of dishonesty, untruthfulness; all taken together, constitute a most unholy recipe for what can only be a disastrous appellate effort.

Clearly, the record of the Findings reveals, money did not behoove Mr. Axam to act professionally, competently, honestly at the trial level. It is doubtful that an 'Order' of an Appellate Court will motivate him to perform any differently at the appellate level. Mr. Axam was not motivated by his oath to speak truthfully as he testified at the evidentiary hearing. It is doubtful that the Circuit Judge's "Order" to prepare and file Blyden's Brief of Appellant will motivate him to be any more honest in his dealings with Blyden on appeal and with the Judges of the Eleventh Circuit. The Chief Judge of the District Court ordered Mr. Axam to submit an Affidavit; he submitted a "Letter Affidavit", which the Judge noted and found to contain material falsities. On all counts – under oath, not under oath, before the Court, not before the Court – , the Findings of the Chief District Judge as to Mr. Axam is the same – he is not truthful – not a credible person worthy of trust. Now, with this Findings in hand, the Appellate Circuit Judge ought to have been mindful of the old Latin maxim **'Falsus in uno, Falsus in omnibus'** (in English –

'False in one thing, False in all things'), and here apply it. Or, maybe a variation of that old maxim is more relevant: False in the Trial Court, False at the Appellate Court.

At the appellate level, it is reasonable to infer that the Circuit Judge read the Findings of the Chief Judge of the District Court who conducted the Appellate Court ordered Hearing (**a copy of the "Findings of Facts and Conclusion on Remand is attached hereto at Appendix 1**). Read in its entirety, it presents a most unflattering portrait of Mr. Tony Axam, an attorney at law, one devoid of credibility, honesty, responsibility to his clients and his profession, and disrespectful of the judicial process. It is therefore reasonable to infer that the Circuit Judge, first a human being, a former practicing lawyer and now appellate judge, would be left with a rather less than positive impression by the Findings as to Mr. Axam. So what level of trust or credibility does the Court expect Mr. Axam to bring to the prosecution of Blyden's appeal? Recall the words of the Findings as to such a scenario at **page 8**.

10. Blyden cannot obtain adequate relief via the appellate process

Seeking this relief from this Court to resolve the dilemma confronting him is Blyden's very last resort. The Appellate Court has denied and thwarted all efforts of Blyden to date. The records from the courts below reveal substantial efforts on Blyden's part to obtain relief, all to no avail. His last motion to the Appellate Court was denied. Even the order of the district court unsealing the Findings has only been partially recognized by the Appellate Court. It has only released the narrative portion of the Findings, not the transcripts and documentary evidence

which constitute the entire Findings of Facts and Conclusions of Law unsealed by the district court.

This Court must now exercise its supervisory authority to require the Appellate Court and the Circuit Judge not to set aside and ignore the Findings of the District Court. This Court may not retreat into opacity or silence on this issue.

11. Interlocutory Review of this matter will save, not waste judicial efforts

To be sure, this is an Interlocutory review being sought of a matter (the setting aside of the Findings of the District Court without a clearly erroneous determination contrary to **Rule 52(a)**), which falls under the narrow exception to the 'Final Judgement' Rule, which permits interlocutory appeal from orders of lower courts [28 U.S.C. § 1292(b)] that:

a) Conclusively determines a disputed question.

b) Resolves an important issue completely separate from the merits of the action, and

c) Is effectively unreviewable on Appeal from a final judgement – that is an order which involves an asserted right the legal practical value of which would be destroyed if it were not vindicated before trial (Appellate Review in this instance).

See Midland Asphalt Corp v. United States, 489 U.S. 794, 798-99 (1989); *also United States v. Peter Pi*, 174 F.3d 745 (6th Cir.), *cert. denied*, 528 U.S. 825 (1999).

Blyden sought an order from the District Court and was denied. He sought an order from the Appellate Court

and likewise denied. Motions to reconsider, likewise denied. He now confronts the loss of his one and only Direct Appeal, a development directly related to the order of the appellate court, requiring Mr. Axam to represent him on appeal – the Findings of the district court notwithstanding.

While an argument can possibly be made that loss of his only direct appeal would leave him with other avenues, such as various writs, e.g., § 2255, § 2241, etc., Blyden's burden would have been substantially shifted – it would be far greater. The bar he must surmount will have been significantly raised. But that is not all. It would not be a cost effective use of the judicial system. The issues and the facts that Blyden wishes to raise on his Direct Appeal, and the arguments he desires to make, he should be accorded every opportunity to do so. In light of the Findings, the order guarantees an appeal.

SUMMARY

12. The Chronology of Facts

This Court is urged to let the chronology of facts lead to its decision.

1. December 2001, Blyden responds to Counsel's Motion to withdraw as appellate counsel; interposing no objections, but requiring conditions be imposed.

2. In response, the Appellate Court Remands the Case to the District Court for an Evidentiary Hearing.

3. Hearing is conducted by the Chief Judge of the District Court on April 16, 2002.

4. On June 6, 2002, the Chief District Court Judge renders and files the result of the hearing titled, "Findings of Facts and Conclusion on Remand," under seal. It is thereafter sent to Circuit Court.

5. Blyden is not provided a copy of the Findings by the Court.

6. The Appellate Court does not provide Blyden a copy either.

7. Blyden is denied the right to review and respond to the Findings.

8. Blyden notifies the Appellate Court of his non-receipt of a copy.

9. Blyden moves the District Court to unseal and provide him a copy.

10. The District by order entered October 24, 2002, unseals the Findings with instructions for Blyden to obtain a copy from the Appellate Court.

11. Blyden, by motion **twice** filed moved the Appellate Court for a copy of the Findings pursuant to the District Court Order.

12. Finally, by Order dated December 5, 2002, a Judge of the Appellate Court orders the release of a partial copy of the Findings to Blyden, which he receives December 13, 2002.

13. In the meantime, Blyden, having been denied several times by Appellate Court, petitions the United States Supreme Court on the issue, after notifying the Appellate Court of his intent to do so.

14. Blyden files a Petition for Interlocutory Review dated December 9, 2002, and received by the Court December 10, 2002. Blyden also petitioned this Court to issue an Order to embargo further proceedings as to his Appeal pending this Court's review of the issues.

In sum, the foregoing chronology of facts, reflects that Blyden, whose sole intent has been to obtain meaningful Appellate Review of what he considers to be meritorious issues, has been constructively denied that right.

CONCLUSION

Blyden specifically seeks Interlocutory Review of the decision of the Appellate Court to effectively ignore the Findings of Facts and Conclusion on Remand from the Chief District Court Judge, in Ordering Mr. Tony Axam to represent him on appeal.

The Court should grant a writ to require United States Court of Appeals, Eleventh Circuit, and the Honorable Gerald Bard Tjoflat, Circuit judge thereof, to comply with **Fed. R. Civ. P. 52(a)**; or simply order a reversal.

Respectfully submitted

KEVIN SHAWN BLYDEN,
Petitioner Representing Himself,
PO Box 7000 –
Texarkana, TX 75505-7000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA,	*	
	*	CR 198-049
vs.	*	
KEVIN SHAWN BLYDEN	*	

FINDINGS AND CONCLUSIONS
PURSUANT TO REMAND

(Filed Jun. 6, 2002)

On April 16, 2002, after several necessary delays, this Court conducted an evidentiary hearing pursuant to the remand from the Eleventh Circuit Court of Appeals. *See United States v. Blyden*, Appeal No. 01-14259-II (11th Cir., Feb. 25, 2002). The Eleventh Circuit remanded this matter to the District Court to conduct an *in camera* evidentiary hearing:

a) to determine whether Defendant Kevin Shawn Blyden is indigent and financially unable to retain counsel for his appeal;

b) to inquire of Defendant Blyden and his counsel as to his present financial circumstances;

c) to inquire into the amount paid to retained counsel for fees and expenses and the amount, if any, still owing to counsel; and

d) to determine whether the fees received by counsel were in excess of what would constitute a reasonable fee under the circumstances of counsel's representation of this Defendant in the District Court.

The Court has conducted the necessary evidentiary hearing *in camera* and now enters the requisite findings of fact and conclusions of law in narrative form. Further, a copy of the transcript of the *in camera* proceeding is attached.

Defendant Blyden was involved in a major drug importation and distribution conspiracy. He was taken into custody on March 30, 1999. He pled guilty on September 12, 2000. At the time Defendant Blyden pled guilty, two of the principal defendants remained at large, James Spencer Springette and Francis Moulan. Springette, one of the FBI's Ten Most Wanted having escaped from a jail in the country of Colombia and remains at large. Moulan, currently in the secluded custody of the United States Marshal, was only recently arrested. All remaining defendants pled guilty after extensive discovery and the establishment of a firm trial date.

Initially, Defendant Blyden faced a guideline range of 210 to 262 months imprisonment. Receiving the benefit of a Section 5k1.1 motion for downward departure under the United States Sentencing Guidelines, Defendant Blyden was sentenced to a term of 144 months in prison on July 13, 2001. For information purposes, a copy of data pertinent to sentences of co-defendants and defendants in related cases is attached.

Like many defendants associated with venal drug traffickers, Defendant Blyden has a family who cares

about him. Unlike most, Blyden's family is largely composed of intelligent, educated, able, and hardworking people. His father is a retired United States Customs Inspector and his mother is a retired nurse.

When he was arrested, Blyden and his family rejected the idea of court-appointed counsel and sought to obtain the services of attorney Tony L. Axam of Atlanta, Georgia. Blyden's mother, father, and brother in Florida were instrumental in obtaining Mr. Axam's services. Initially, Mr. Axam accepted from the family a retainer fee of which all but $500.00 would be refundable should he decide not to accept the case. After interviewing Defendant Blyden and accepting the case, Mr. Axam and the Blyden family agreed upon a total fee of $150,000.00. Of the $150,000.00 agreed upon fee, the Blyden family actually paid Mr. Axam $125,000.00 in money orders of various increments. There was no dispute about the amount paid or the source of the funds. Accordingly, it was not necessary to summon family members as witnesses.

In accordance with the Local Rules of this Court, Mr. Axam hired local counsel, Mr. Jack Boone of Augusta, Georgia. He expected local counsel would participate with him through the trial of the case.

According to his recollection without records, Mr. Axam testified that he established a fee for Mr. Boone of between $25,000.00 and $50,000.00. Of that sum, Mr. Axam testified that $15,000.00 had been paid to Mr. Boone. Having heard the testimony of Mr. Axam on this subject, I summoned Mr. Boone from an afternoon's work on his boat (which is also his office) and obtained his testimony about the amount actually paid to him by Mr. Axam. Mr. Boone testified that Mr. Axam had paid him

the sum of $7,500.00, and recalled a promise to pay another $7,500.00 for a total of $15,000.00. A "letter affidavit" of Mr. Axam, filed subsequent to the hearing, resolved any discrepancy between the testimonies of Mr. Axam and Mr. Boone. In his affidavit, Mr. Axam states that he paid only $7,500.00 to Mr. Boone.

Mr. Axam does not contend that the family or Defendant Blyden owes him another $25,000.00. Mr. Axam is content with the $125,000.00 fee he has been paid. Further, he candidly stated that should the Court determine that the sum paid to him was excessive, he would willingly pay appointed counsel.

Having examined Defendant Blyden under oath, having reviewed his presentence report, and having discussed the entire matter with the United States Probation Officer, I am convinced that Defendant Blyden is indigent and financially unable to retain counsel for his appeal at this time. Defendant Blyden made no payment to Mr. Axam. His family paid the entire fee. In fact, Mr. Blyden contends that he is now indebted to his family for the $125,000.00 fee. Further, having considered Mr. Axam's statements under oath, I find that there is no further amount owing to Mr. Axam by Defendant Blyden or his family members.

Defendant Blyden's present financial circumstances are typical of federal prisoners. His only asset, an aging BMW automobile, is in the possession of a former wife in Florida. This asset is of minimal value. Additionally, Defendant Blyden and his former wife have a child together. However, the former wife has received no child support or other assistance from Defendant Blyden in years.

The greatest of the questions referred to this Court is whether Mr. Axam's fees were reasonable. Mr. Axam values his time at between $250.00 and $750.00 per hour. I do not. Further, Mr. Axam, having taken the case for a quoted fee, did not keep time records. Instead, he makes a rough time estimate in his affidavit. His expenses alluded to during the *in camera* evidentiary hearing were the fee he paid to Mr. Jack Boone and the salary he paid for the assistance of another lawyer. The other lawyer's salary should have been less than $10,000.00.

A telling feature of the *in camera* evidentiary hearing is the discrepancy between the testimony of Mr. Axam and Mr. Boone. I have known Mr. Boone since the beginning of his law practice. He is an engaging, aggressive, and effective, if not artful, practitioner. Mr. Axam's few appearances in this Court have been fraught with delays and scheduling problems. While this case admittedly involved a significant drug importation and trafficking conspiracy, the amount of the fee is nevertheless astonishing. Cash fees paid in the range of $125,000.00-$150,000.00 are probably somewhat common in the Atlanta environment. In the Southern District of Georgia, particularly the Augusta Division, a fee of such size is a rarity. Defendant Blyden also points out that Mr. Axam applied very little personal time to his case. Mr. Axam, however, testifies that he did little else for a number of months.

Having reviewed the file and the case docket extensively, it is my view and finding that the amounts received by Defendant Blyden's counsel, Tony L. Axam, were in excess of what would constitute a reasonable fee under the circumstances. While everyone expected the case to go to trial and were preparing for the trial over an extended period, the case was resolved by a guilty plea. There was

no three-week trial (as we had prepared for), nor any two-month trial that Mr. Axam had prepared for.

Certainly, many thousands of pages of discovery were distributed to all counsel. However, as Defendant Blyden points out, only a small portion of that pertained to him. Because the matter was to be conducted *in camera*, I have refrained from any inquiry to the United States Attorney with respect to the extent of discovery materials pertaining to Defendant Blyden. A laborious review of the discovery materials (which I have not done) would be the only means to make this determination.

Giving Mr. Axam every benefit of the doubt I can muster with respect to his expenses and probable trial preparation, it is my finding that the fee was excessive by $50,000.00. It is very difficult to attempt to value the services of an attorney who has kept no contemporaneous time records and has presented only estimates as Mr. Axam has. Accordingly, the resulting valuation of his services at $75,000.00 is may [sic] be somewhat generous.

While the remand of the Eleventh Circuit Court of Appeals is not specific in directing such a question to this Court, I would feel remiss in not reporting some observations about the relationship between Defendant Blyden and Mr. Axam. It is my view that their relationship has deteriorated to the point that it is entirely antipathetic. Mr. Axam has expressed a considerable level of remorse about his handling of Defendant Blyden's case, particularly at sentencing. Further, Defendant Blyden is understandably, vociferously, and decidedly displeased about the entirety of Mr. Axam's representation, the amount of money Mr. Axam accepted from his family, the few occasions on which he actually saw Mr. Axam, and Blyden's

perception of the poor quality of Mr. Axam's representation. From the observations I gained at the evidentiary hearing and my review of the documents filed by Defendant Blyden, I conclude that it would be impossible for any level of confidence to be resurrected between Defendant Blyden and Mr. Axam. It is my view that alternate counsel should be appointed for the appeal, if there is to be one.

Additionally, I must point out that significant discrepancies exist between Mr. Axam's testimony at the *in camera* hearing and his affidavit. For instance, Mr. Axam testified that he was paid an initial retainer of $10,000.00. In his affidavit, however, Mr. Axam states that the retainer equaled $25,000.00. At the hearing, Mr. Axam said he paid Mr. Boone $15,000.00 to serve as local counsel. Mr. Axam's affidavit, composed days after the hearing, lists Mr. Boone's fee as $7,500.00, which amount conforms conveniently with Mr. Boone's statement.

Upon the foregoing, it is my conclusion that Defendant Kevin Shawn Blyden is indigent and financially unable to retain counsel for his appeal. Having inquired of Defendant Blyden, I am convinced that his present financial circumstances are simple destitution. I have not inquired of any family member about the payment of counsel's fees because the payment of the amount of $125,000.00 is one thing between Defendant Blyden and Mr. Axam which is not contested. No further sums are owed to Mr. Axam by Defendant Blyden or his family.

Finally, Mr. Axam received the total sum of $125,000.00. Indeed, he had the usual office expenses, including the salary of an associate. He also paid out $7,500.00 to Mr. Jack Boone. Nevertheless, under the circumstances, Mr. Axam's fee, including the $7,500.00

paid to Mr. Boone, exceeded the value of his services by $50,000.00.

The Clerk shall forward this document and a transcript of the April 16 hearing as soon as possible to the Clerk of the Court of Appeals under seal.

SO ENTERED at Augusta, Georgia, this 6th day of June, 2002.

/s/ Dudley Bowen
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

01-14259-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KEVIN SHAWN BLYDEN,
a.k.a. Kevin Shawn,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Georgia

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(Filed Dec. 5, 2002)

ORDER:

The Court has received from Appellant himself a "Motion for an Order Authorizing . . . ," construed as a successive motion for reconsideration of the denial of attorney Tony L. Axam's motion to withdraw and to proceed *pro se*, a motion to stay this appeal, and a motion for a copy of the district court's June 6, 2002, order on limited remand.

As a matter of clarification, the Court notes that Mr. Axam remains Appellant's counsel of record, and that the Court has previously denied both Mr. Axam's motion to withdraw and Appellant's motion for reconsideration of that denial. The Court does not entertain successive motions for reconsideration.

The Court cannot consider Appellant's other *pro se* requests for relief, as Appellant is represented by counsel. *See* 11th Cir. R. 25-1. accordingly, the Clerk is DIRECTED to return Appellant's motion to him unfiled. However, the Court notes that Appellant is entitled to a copy of the district court's June 6, 2002, order on limited remand. The Clerk is directed to send Appellant himself copies of the district court's order as well as this order.

/s/ Stanley Marcus
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

01-14259-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KEVIN SHAWN BLYDEN,
a.k.a. Kevin Shawn,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Georgia

(Filed Nov. 1, 2002)

Before: TJOFLAT and BIRCH, Circuit Judges.

BY THE COURT:

Appellant has filed a *pro se* "Motion for Extraordinary Relief," a "Reasserted and Amended Petition for Extraordinary Relief," and a "Motion to Reconsider Order Denying Counsel's Motion to Withdraw," which are collectively construed as a motion for reconsideration of this Court's order dated August 1, 2002. Upon reconsideration, the motion to withdraw by appellant Kevin Shawn Blyden's retained counsel, Tony L. Axam, is DENIED. Appellant's motions for appointment of substitute counsel and to proceed *in forma pauperis* on appeal are DENIED.